(4)

No. 08-1351

Supreme Court, U.S.
FILED
JUL 9 - 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CAMERON FRAZIER,

Petitioner,

—v.—

DR. ERIC J. SMITH, Commissioner,
Florida Department of Education, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION

JAMES K. GREEN
JAMES K. GREEN, P.A.
Suite 1650, Esperantè
222 Lakeview Avenue
West Palm Beach, Florida 33401
(561) 659-2029

RANDALL C. MARSHALL
Counsel of Record
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF FLORIDA, INC.
4500 Biscayne Blvd, Ste 340
Miami, Florida 33137-3227
(786) 363-2700

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REPLY 1

I. THE STATUS OF THE AS-APPLIED CHALLENGE TO FLORIDA'S PLEDGE STATUTE. 1

A. The Consent Order Did Not Resolve The As-Applied Claims. 1

B. The Consent Order Invited The State To Defend The Pledge Statute. 2

C. The Consent Order Specified The Relief To Be Afforded Frazier From The School Defendants If His Constitutional Challenges Were Successful. 3

CONCLUSION 4

TABLE OF AUTHORITIES

Constitution and Statutes

First Amendment to the United States Constitution 2, 4

Fla. Stat. § 1003.44(1)("pledge statute") ..... *passim*

Fourteenth Amendment to the United States Constitution 2, 4

REPLY

Petitioner Cameron Frazier submits this reply to clarify the status of the as-applied challenge in light of the Eleventh Circuit's decision. With respect to the arguments presented by the State Respondents, Petitioner believes that they are fully addressed in the Petition and that no reply to them is necessary.

I. THE STATUS OF THE AS-APPLIED CHALLENGE TO FLORIDA'S PLEDGE STATUTE.

A. The Consent Order Did Not Resolve The As-Applied Claims.

The State Respondents erroneously assert that Frazier's "as-applied claims were quickly resolved by a consent order to which the school defendants had agreed" and that "[d]espite prevailing on his as-applied claims, Frazier continued to press a facial challenge to the statute against state education officials." Response at p. 4 and n. 1.

The consent order, App. at 77a-86a, did not resolve any claims. Rather, the order set forth a procedural framework and a briefing schedule in order to resolve both the as-applied and facial challenges to the pledge statute. For purposes of deciding the constitutional claims, the school defendants stipulated to various facts and agreed that the claims could be decided as a matter of law. *See* App. at 48a, 79a-81a; Petition at pp. 5-6 and n. 4.

B. The Consent Order Invited The State To Defend The Pledge Statute.

The consent order further required notice to the Florida Attorney General – and the State Respondents – that the district court intended to rule on Frazier's constitutional challenge to the pledge statute and invited "the Attorney General for the State of Florida and the state defendants to defend Fla. Stat. §1003.44(1) as challenged by plaintiff." App. at 84a-85a.

The State Respondents accepted the district court's invitation and contested both the as-applied and facial challenges to the pledge statute. Both challenges were resolved by the district court's opinion granting summary judgment to Frazier against the School defendants and denying the State's motion to dismiss. App. at 38a-76a. The district court held that the pledge statute "to the extent that it requires a student to obtain a parent's permission to be excused from reciting the pledge of allegiance and requires a student to stand during the pledge of allegiance, is unconstitutional on its face and as applied to Frazier in violation of his First and Fourteenth Amendment rights." App. at 73a.

For the first time in this litigation, the State Respondents acknowledge that the statute was applied to Frazier "in an unacceptable manner." Response at p. 3. The State Respondents then assert that "[t]he State did not contest that the statute was applied unconstitutionally to Frazier." *Id.* at p. 5. While they did not appeal the district court's as-applied findings to the Eleventh Circuit, the State

Respondents contested Frazier's as-applied challenge in the district court. *See* App. at 51a-54a, 61a, 73a.

State Respondents also erroneously assert that Frazier's "mother consented to his excusal" from reciting the pledge of allegiance. Response at n. 2, p. 5. Frazier's mother did not consent.

In fact, the State argued in the district court that Frazier lacked standing to challenge the statute as applied because his mother had not consented to his being excused from reciting the pledge. *See* App. at 51a: "As to the as applied challenge, the State Defendants argue that the statute was never applied against Frazier because he did not have a parent's permission to be excused from reciting the pledge. The State Defendants also contend that Frazier's failure to seek parental permission renders his challenge moot." *See also* App. at 54a: "The State Defendants maintain that the as applied challenge is lacking because Frazier did not secure parental permission to be excused." These contentions were rejected by the district court. App. at 51a-61a. The district court specifically rejected the State Respondents' assertion that they could not be subject to an as-applied challenge and held that "Frazier may bring facial and as applied challenges as to all parts of the pledge statute." *Id.* at 61a.

C. The Consent Order Specified The Relief To Be Afforded Frazier From The School Defendants If His Constitutional Challenges Were Successful.

In the consent order, Frazier and the school

defendants agreed to the relief to be awarded "[c]ontingent upon a finding by the Court for plaintiff that Fla. Stat. §1003.44(1), to the extent that it requires a student to obtain a parent's permission before being excused from reciting the pledge of allegiance and requires a student to stand during the pledge of allegiance, is unconstitutional on it face and as applied to Plaintiff, in violation of his First and Fourteenth Amendment rights ... ." App. at 82a. Because of this contingency, and the Eleventh Circuit's reversal of the district court's finding of facial invalidity on the issue of parental consent, Frazier has not obtained any of the relief outlined in the consent order. *See* Petition at n. 6, pp. 7-8. Also as a consequence of the contingency and the Eleventh Circuit's reversal, the school defendants are no longer bound by their admissions in the consent order and the as-applied challenge to the parental consent requirement will have to be retried upon remand to the district court. *See* Petition at n. 8, pp. 8-9. Only the district court's finding that the pledge statute's requirement that students remain standing during the pledge, even those excused from reciting it, was unconstitutional as applied and on its face survives the Eleventh Circuit's decision. *See* App. at 24a-27a.

Only the facial challenge to Florida's parental consent requirement to be excused from reciting the pledge of allegiance is before this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

Randall C. Marshall
Counsel of Record
ACLU Foundation of
Florida, Inc.
4500 Biscayne Boulevard,
Suite 340
Miami, FL 33137-3227
(786) 363-2700
(786) 363-1108 (facsimile)

James K. Green, Esq.
JAMES K. GREEN, P.A.
Suite 1650, Esperante'
222 Lakeview Ave.
West Palm Beach, FL 33401
(561) 659-2029

Cooperating Attorney for
the ACLU Foundation of
Florida, Inc.

Attorneys for Cameron
Frazier

Dated: July 9, 2009